

Li (Migration) [2018] AATA 4910 (26 October 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Yue Li

CASE NUMBER: 1715323

DIBP REFERENCE(S): BCC2015/1758699

MEMBER: Ann Duffield

DATE: 26 October 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 Schedule 2 to the Regulations; and
- cl.820.221 of Schedule 2 to the Regulations.
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- Statement made on 26 October 2018 at 2:04pm

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CATCHWORDS

MIGRATION – Partner (Temporary)(Class UK) – Subclass 820 (Spouse) – genuine relationship – consistent evidence about household arrangements – joint purchase of property – holiday and attend social events together – draw emotional support to each other – decision under review remitted for reconsideration

LEGISLATION

Marriage Act 1961 (Cth) ss 5F, 65

Migration Regulations 1994 (Cth) rr 1.09A, 1.15A Schedule 2 cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 28 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 June 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the parties were in a genuine spousal relationship as envisaged by the Migration Act.
4. The applicant appeared before the Tribunal on 26 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and her father. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by his registered migration agent who also attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor within the meaning of the Migration Act.
8. The parties provided the Tribunal with a copy of the delegate's decision along with their application for review.
9. The applicant is a citizen of China born on 5 April 1984 (34 years old). He first arrived in Australia in November 2008 on a student visa and has held several visas since that time. He applied for a Partner visa on 18 June 2015 and is on a bridging visa in relation to that application.
10. The sponsor is an Australian citizen by grant on 24 February 2011. She was born in China on 17 November 1989 (29 years old). She first arrived in Australia in February 2007.
11. The parties claim to have first met in February 2015 and were married on 2 June 2015. The lodged their application for a spouse visa on 18 June 2015. They moved into together after their marriage and purchased an apartment together. They took possession of that apartment and moved in there in November 2017.

Whether the parties are in a spouse or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen (citizenship document at Folio 18 of the department's file).
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

14. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. There is a copy of the parties' marriage certificate at Folio 39 of the department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

15. The Tribunal found the parties' evidence during the scheduled hearing to be credible, consistent and compelling. The Tribunal accepts the applicant's claims for the following reasons.
16. The Tribunal has considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
17. The parties' financial arrangements are complex. They provided the Tribunal with a copy of their mortgage documents, the purchase contract for their apartment in Southbank and the settlement documents from the lawyer. The Tribunal was concerned that the applicant was able to obtain a bank loan for a substantial sum of money despite being on a bridging visa. The parties both told the Tribunal that they made enquiries and were told that the Commonwealth Bank would lend to some applicants on a bridging visa. In any case, they informed the Tribunal that they engaged the services of a mortgage broker who obtained the loan for them. The Tribunal accepts that the parties provided the broker with all the relevant information, including that the applicant was on a bridging visa.
18. The applicant's parents have contributed substantially to the parties' affairs, including by providing the deposit for their apartment in Southbank and the purchase of a car. In all, the applicant's parents have provided him with over \$100,000 in the past couple of years. The sponsor's parents have also contributed to the purchase of household goods of around \$10,000. The parties' bank statements show that they share household purchases out of their joint account.

19. The Tribunal questioned the parties about the expenditure, in particular the different delivery addresses noted in relation to particular purchases. However the Tribunal accepts that all of the household purchases were for their apartment in Southbank and none were purchased for the benefit of anyone else.
20. The Tribunal is satisfied that the financial aspects of the parties relationship support a finding that they have a long term commitment to each other.
21. The Tribunal has considered the nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
22. The parties gave consistent information about their household arrangements and their work schedules. They regularly travel to China together and holiday together in Australia. They have plans to have children in the future.
23. The Tribunal is satisfied that the nature of the parties' household supports a finding that they have a mutual commitment to a shared life together to the exclusion of all others.
24. The Tribunal has considered the social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
25. The parties families are known to each other and have spent time together both in China and here in Australia. The parties have provided evidence that they holiday together and attend social events together.
26. The Tribunal is satisfied that the social aspects of the parties' relationship support a finding that their relationship is genuine and continuing.
27. The Tribunal has considered the nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
28. The parties both provided consistent evidence about their meeting and marriage and the circumstances surrounding their lives together, including the joint purchase of their apartment in Southbank. It was evident to the Tribunal that they drew emotional support from each other. The parties have combined their financial resources and have married. Their families are known to each other and have spent time together. The parties have told the Tribunal that they both intend to have their own businesses in the future. In the meantime they will continue to build those resources to enable them to have a family.
29. The Tribunal is satisfied that the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the parties are in a genuine and continuing relationship and that they live together.
30. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made at the time of this decision.
31. Therefore the applicant meets cl.820.211 and 820.221.

CONCLUSION

32. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

33. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Ann Duffield
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).